

those independent directors to select and nominate other independent directors.

The Commission also notes that registered management investment companies will still be required to comply with the new rules relating to audit committees, consistent with Rule 10A-3. In addition, business development companies will be required to comply with all of the new requirements under both proposals, but will be required to use the "interested person" standard under the Investment Company Act for purposes of determining director independence.

Both NYSE and Nasdaq further proposed to exempt asset-backed issuers and other passive issuers from the new requirements relating to board independence and independent director role in nomination and compensation decisions, as well as from the new requirements relating to audit committees. The Commission believes that such an exemption is reasonable, and notes that such entities are exempt from the requirements of Rule 10A-3.

The Commission further believes that other proposed provisions relating to limited partnerships, companies in bankruptcy, and cooperative entities are reasonable, given the specific characteristics of these entities. The Commission notes that these provisions have been designed for consistency with Rule 10A-3.

The NYSE proposal would permit foreign private issuers to follow home country practice in lieu of the provisions of the new rules, except that such issuers would be required to comply with the requirements relating to audit committees and notification of non-compliance mandated by Rule 10A-3. In addition, foreign private issuers would be required to disclose significant ways in which their corporate governance practices differ from the standards that NYSE requires of domestic companies. The Nasdaq Issuer Applicability Proposal clarifies that Nasdaq's existing authority under its rules to provide exemptions from its corporate governance standards as necessary so that a foreign private issuer is not required to do any act that is contrary to home country laws or business practices does not apply to the extent that it would be contrary to the requirements of Rule 10A-3. Nasdaq would also require a foreign private issuer to disclose each domestic requirement from which it is exempted, and to describe the home country practice, if any, followed by the issuer in lieu of domestic requirements. The Commission believes that granting exemptions to foreign private issuers in

deference to their home country practices—so long as they comply with Rule 10A-3 requirements—is appropriate, and believes that the disclosure requirement will help investors determine whether they are satisfied with the alternate standards.

#### *Nasdaq Going Concern Proposal*

Nasdaq proposed to require each listed company that receives an audit opinion that contains a going concern qualification to make a public announcement of such event. No commenters offered their views on this proposal. The Commission believes this requirement will help to bring to the attention of investors and potential investors the receipt of a going concern qualification by a company, which the Commission believes is important information for shareholders.

#### *Nasdaq Related Party Transactions Proposal*

Nasdaq proposed to strengthen its current rule addressing the review of related party transactions to provide that all such transactions would not only need to be reviewed for potential conflict of interest situations on an ongoing basis, but that all such transactions would also have to be approved by the listed company's audit committee or another independent body of the board of directors. No comments were received on this proposal. The Commission believes that requiring an independent body of the board of directors to approve all related party transactions should help to protect investors because directors not related to management should be less likely to approve of related party transactions that could be detrimental to the interests of shareholders.

#### *Implementation Dates and Transition Periods*

The Commission notes that both NYSE and Nasdaq have amended the compliance dates and the transition periods associated with the new standards relating to director independence, board committees, and notification of non-compliance so that the periods are consistent with the transition period for Rule 10A-3. The Commission believes that this revision will provide for ease of implementation. Accordingly, companies will be expected to begin complying with these new listing standards as of the earlier of their first annual meeting after January 15, 2004 or October 31, 2004, except as otherwise provided in the case of foreign private issuers, small business issuers, and initial public offerings

consistent with Rule 10A-3.<sup>380</sup> The Commission further believes that the proposed provisions relating to companies transferring their listing from one market to another are reasonable and appropriate.

#### **VI. Accelerated Approval of NYSE Amendment Nos. 2 and 3, Amendment Nos. 2, 3, 4, and 5 to the Nasdaq Independent Director Proposal, Amendment Nos. 2 and 3 to the Nasdaq Related Party Proposal, Amendment Nos. 1, 2, and 3 to the Nasdaq Issuer Applicability Proposal, and Amendment No. 2 to the Nasdaq Code of Conduct Proposal**

The Commission finds good cause for approving NYSE Amendment Nos. 2 and 3, Amendment Nos. 2, 3, 4 and 5 to the Nasdaq Independent Director Proposal, Amendment Nos. 2 and 3 to the Nasdaq Related Party Proposal, Amendment Nos. 1, 2, and 3 to the Nasdaq Issuer Applicability Proposal, and Amendment No. 2 to the Nasdaq Code of Conduct Proposal prior to the thirtieth day after the amendments are published for comment in the **Federal Register** pursuant to section 19(b)(2) of the Exchange Act.

The Commission believes that NYSE Amendment Nos. 2 and 3, Amendment Nos. 2, 3, 4, and 5 to the Nasdaq Independent Director Proposal, and Amendment Nos. 2 and 3 to the Nasdaq Issuer Applicability Proposal address many concerns raised in the comment letters. Other changes provide more guidance regarding certain provisions that needed further clarification or were added to bring greater harmony to the NYSE and Nasdaq proposals. As discussed above, the Commission believes that these proposed rule changes, as amended, are reasonable and appropriate and serve the interests of the investing public. The Commission further believes that accelerating the approval of these amendments will enable NYSE and Nasdaq to put into place a complete and comprehensive set of corporate governance standards for listed companies in time for the 2004 proxy season. In addition, the NYSE and Nasdaq provisions relating to audit committees respond to the mandate of Rule 10A-3, which requires SROs to have such rules in place by December 1, 2003.

<sup>380</sup> The Nasdaq Going Concern Proposal, however, is effective immediately upon adoption, and issuers will be required to comply with the Nasdaq Code of Conduct Proposal six months from the date of Commission approval. In addition, foreign issuers will be required to disclose receipt of a corporate governance exemption from Nasdaq for new filings and listings made after January 1, 2004.